The industry argument that an appropriate benchmark can in part be based on an examination of rates in communities where there is effective competition is on sounder ground in principle,[35] but fatally flawed as applied. First, in many cases, the industry only considers rates in "effective competition" communities in conjunction with existing rates; even if one assumed the industry applied effective competition data properly, such an approach reduces, but does not eliminate, the monopoly component in existing rates.

Second, the industry urges the Commission to arbitrarily ignore the lowest rates reported in "effective competition" communities, on the ground that those rates must reflect "greenmail." In fact, as the Coalition's initial comments showed, some of the lowest per-channel rates are charged by major MSOs in competition with small and sometimes municipally-owned cable systems.[36] We presume the industry is not claiming these are greenmail rates. On the other hand, the industry would apparently include rates in communities where there is, in fact, no active head-to-head competition.

The industry ignores the fact that, in many communities, two or more cable operators have franchises to serve the entire area, but no more than one operator actually offers service to any

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[35] The Coalition developed a benchmark based in part on a consideration of rates in communities which were reported to have two competing operators. <u>See</u> Attachment 2 to Coalition's initial comments.

[36] <u>See</u> Smith & Katz, Exh. B-5, rates for Storer Cable in Troy, Alabama, and TeleScripps Cable in Glasgow, Kentucky.

resident. The result is two or more systems with monopoly control, and corresponding monopoly rates. Where rates do not reflect competition - regardless of the number of multichannel video distributors in the area - they should be ignored, and not randomly adjusted in a vain attempt to calculate what rates would be if the competition were real.

2. The Price-Based Benchmarks Proposed By The Industry are Unworkable as a Long Term Regulatory Approach

Perhaps most importantly, while it is possible to derive a reasonable rate by applying a combination of available price data from competitive markets, and available cost data,[37] over time it will be extremely difficult (impossible, under the industry's proposal) to derive reasonable rates using only price data, in part due to serious "gaming" problems. The industry proposes to use price data as the primary method of regulating rates over the long-term, without adequately addressing these problems.

Using benchmarks based on rates, without reference to costs, gives no assurance over the longer term that monopoly profits will not be collected. Even the industry acknowledges this.[38] Over the longer term, then, the costs of providing cable service should be considered in order to protect against

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[37] Smith & Katz Comment Analysis, p. 12. However, price data on existing rates cannot be used.

[38] TCI study at 13, n 8. (It is impossible, without information about costs, to know whether a price increase merely represents the exercise of market power).

unreasonable and uncompetitive rates.[39] The Act provides that, in establishing basic rate regulations, the FCC should consider "a reasonable profit . . . consistent with the Commission's obligations to subscribers under paragraph (1)." § 623(b)(2)(C)(vii), 106 Stat. at 1466. The conference report makes clear that profits earned from other cable services may also be considered. H.R. Conf. Rep. No. 862 at 63, 1992 U.S.C.C.A.N. 1245. The amount of profits cannot be evaluated absent some consideration of costs. Further, as the Conference Report makes clear, the Act's language was amended from previous versions to emphasize that profits could only be reasonable, and not excessive, "consistent with the goal of ensuring that rates to consumers are reasonable." Id. As costs change (and profits increase or decrease), it will be impossible under the industry's proposals to contain operators' profits to reasonable levels because: a) benchmarks are established without knowledge of how much of the rate exceeds cost, and b) the rates are based on existing rates that include excessive profits.

The solution is to adjust existing rate levels in a manner reasonably calculated to eliminate monopoly profits, to provide some measure of immediate relief from excessive cable rates, and to collect information regarding costs of providing cable service

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[39] See discussion at Part II, infra.

as a long-term means of determining whether an operator's rates and profits are justified.[40]

Not only do the specific regulatory methods proposed by the industry ignore costs and rely on existing rates that contain monopoly rents, they are formulated in various ways that are designed to increase the rates resulting from the benchmarks suggested by the industry would likely be even higher than the rates Congress sought to roll back. A large proportion of operators have increased rates significantly since the Act was passed.[41] Members of Congress have made clear that such increases violate the intent of the Act, and should not be permitted to go forward unchecked.[42] Moreover, many of the industry benchmarks add on to existing rates "pass-throughs" of PEG costs, franchise fees and other items which are already accounted for once in existing rates. See, e.g., Continental Cablevision comments at 43-44. Other industry suggestions include allowing a pass-through for additional PEG costs and new programming services (including direct costs, overhead and a reasonable profit), apparently in addition to any periodic adjustment made to the benchmark.[43] Moreover, the same proposal

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[40] This is precisely the two-step regulatory method proposed by the coalition. See Coalition's initial comments at 49-50 and discussion at Part II infra.

[41] See Coalition's initial comments at 38 n.37 and 45 n.41.

[42] See Letter from Sens. Hollings, Inouye, Gorton and Danforth and Reps. Markey and Dingell to FCC Chairman Alfred Sikes, December 9, 1992. Attachment 4 to Coalition's initial comments.

[43] NCTA study at 25-26.

would allow benchmarks to be exceeded upon a showing by an operator that it has above average costs.[44] Apparently, PEG costs under this method would be included in the benchmark, with increased PEG costs passed through and with a right to show that the benchmark should be exceeded because of unusually high PEG costs: a nifty hat trick, if approved.

While the cable industry comments seem uniformly to advocate a non-cost-based benchmark approach to rate regulation, they also argue that supplementary proceedings must be held to adjust that benchmark to special situations.[45]

Moreover, industry comments make clear that under their proposal, the exceptions swallow the rule and can only lead to excessive rates. According to a report of an ex parte presentation to FCC staff members, filed January 19, 1993 by Gardner F. Gillespie of Hogan & Hartson, Prime Cable (which provides cable service in Anchorage, AK, Houston, TX, Las Vegas, NV and Chicago, IL) faces greater-than-average costs of providing service in these large cities. According to that filing, for example, large city systems (1) "are more capital intensive than small markets," (2) "most still produce a deficit net income" and

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[44] Id. at 6.

[45] There is good reason to be skeptical of the claims that cost variations in the industry require special rate treatment in most cases. Certainly rates do not reflect wide departures in costs: rates are remarkably uniform from system to system. Cable Systems Hike Rates Average of 6.7% After Passage of 1992 Cable Act, Warren's Cable Regulation Monitor, January 25, 1993 at 1.

(3) "[f]uture capital outlays to add channel capacity are enormous!"

Interestingly, comments filed by Gardner F. Gillespie and Jacqueline P. Cleary of Hogan & Hartson on behalf of the Coalition of Small System Operators notes that small system operators "typically operate with a lower profit margin than large operators...."[46] In addition, those comments assert that it would cost one small system operator serving 304,000 subscribers from 416 headends about $2.45 to add a single channel of programming. The same programming added to a suburban system serving 304,000 subscribers from one headend would cost about $0.05 per subscriber.[47] Similarly, for a system with 60 percent penetration, the cost of building one plant mile would be about $800 per subscriber where the density is 25 homes per mile, about $500 per subscriber for a density of 40 homes per mile, and about $133 per subscriber for a density of 150 homes per mile.[48]

Thus, according to one industry attorney, costs of providing service are "unusually" high both for operators serving small, rural communities and for operators serving big cities.[49]

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[46] Comments of Coalition of Small System Operators at 2 (footnote omitted).

[47] Id. at 4.

[48] Id. at 5.

[49] The comments filed by the Coalition of Small System Operators made no reference to costs of providing service in large cities. Likewise, comments filed by Prime Cable made no reference to costs borne by small system operators.

Apparently then, in all cases, there would have to be variances from the benchmarks.

The industry proposes several ways for accommodating these alleged cost variances. First, by urging the FCC to set benchmarks based on existing rates, the industry implicitly advocates setting benchmarks high enough so that every operator, regardless of its individual costs of service, will be practically assured a profit. Second, industry proposals maintain that an operator must be provided one or more opportunities to show that above-benchmark rates are justified in light of individual costs. Third, industry commenters propose to allow "pass-throughs" of particular costs. Fourth, the industry supports conducting regression analyses to create numerous classifications designed to accommodate different costs of providing service. Fifth, some operators suggest that certain portions of the industry should simply not be regulated.[50]

Another proposal would allow an operator to exceed a benchmark by a certain amount, such as 10 percent, before any challenge could be made.[51] A similar suggestion is to calculate a benchmark based on average rates (perhaps with some modification made to factor in competitive rates), and then set a benchmark <u>above</u> that average because (the argument goes), "it

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[50] <u>See, e.g.</u>, Comments of Consortium of Small Cable Systems at 2-5 (arguing that small systems should be exempt from rate regulation). According to statistics, about 52 percent of all systems in the country serve fewer than 1,000 subscribers. <u>See</u> Comments of Northland Communications Corporation at 12.

[51] Continental Cablevision comments at 32.

would be unreasonable to base benchmark rates solely on the lower half of the range of rates found among competitive systems."[52] It is unclear why, in either of these cases, an operator should be allowed to set rates above an ostensibly reasonable benchmark; the "fudge factor" is not designed to provide any incentives for efficient operation, or serve any other apparent legitimate regulatory purpose.

In short, the industry proposes to establish benchmarks that will set minimum rates, but presents a plethora of reasons why the benchmarks it proposes should be allowed to be circumvented to allow even higher rates. Benchmarks that cannot lend to appropriate rates for cable operators serve no purpose.

The problems associated with allowing the industry to justify rates upward from a benchmark for allegedly unique costs (without any downward adjustments) are evident in Wadsworth, Ohio. Time Warner has applied a surcharge to the bills in Wadsworth to cover what it claims are costs associatd with providing three access channels that are not provided in surrounding communities. However, the surrounding communities are provided three channels that are not provided in Wadsworth;

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[52] NCTA study at 14. This argument is clever rather than sound. First, it ignores the fact that benchmarks under this proposal will be based largely on average existing rates, not on rates in systems facing competition. Second, it is inconsistent with other aspects of the proposal that rates can never be required to be below the benchmark, but rates above the benchmark can be sustained, even without a full cost-of-service showing. Third, it ignores the fact that Congress did not want basic rates to "<u>exceed</u>" rates that would be charged in a competitive system. Under NCTA's approach, <u>more than half</u> of the rates would be higher than Congress intended.

nonetheless, no adjustment downward is made to the rates in Wadsworth to reflect the fact that any "unique" costs associated with access are infact offset by savings in other programming and equipment costs. There is no sound regulatory reasons for recognizing costs while ignoring revenues, but that is exactly what Time Warner is doing in Wadsworth, and what the cable industry now asks the FCC to allow it to do nationwide.

All of the arguments raised by the industry lead to the conclusion that its proposals must be rejected, and a different benchmark established.

3. The Industry's Procedure for Deriving Benchmarks are Flawed

The cable industry is as committed to retaining its monopoly profits as Congress was to eliminating them. Continental Cablevision, for example, proposes to allow "good will" to be recovered in rates.[53] It has already been determined that cable companies are monopolists in communities lacking competition, and monopolists have no "good will" value; people take their services because they have no other choice. Telecommunications Inc. v. Comm'r of Internal Revenue, 95 T.C. 36 (Nov. 7, 1990) (Docket No. 268-89).

Continental also urges the FCC to allow rates to include the acquisition price of a system, to the extent that the price reflects the purchaser's expectation of higher revenues in

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[53] Continental Cablevision comments, App. A at 11 and App. B at 5.

the future.[54] This argument is circular: an operator should be allowed to charge subscribers more because it purchased a system on the expectation that it would be able to recover the purchase price through monopoly rates.[55] Congress, however, has made it clear that operators are not entitled to monopoly rents, directly or indirectly. Moreover, Continental's approach would simply guarantee continued future overpayment for systems, and certainly would not protect subscribers from excessive rates. It also reflects the industry's general attitude that operators should be allowed to recover fully for any expenditures, regardless of whether the expenditures were imprudent or otherwise excessive. No principles of rate regulation, nor of constitutional law, support such an approach.[56]

The industry suggests that price caps are not useful or necessary with respect to cable regulation. The industry claims first that the FCC should not set a "cap" on increases of rates below benchmarks, primarily because, to do so would punish "good actors."[57] Instead, operators should be permitted to increase rates up to benchmark levels, without restriction. Effectively, under the industry's view, benchmarks are a rate floor, perhaps,

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[54] Id., App. B at 6.

[55] Congress noted that sales prices of cable systems "far exceed" the replacement value. Senate Report at 10, 1992 U.S.C.C.A.N. at 1142.

[56] See, e.g., Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1181 (D.C. Cir. 1981).

[57] See, e.g., Comments of NCTA at 29; Continental Cablevision comments at 27.

but not a ceiling.[58] But, any rate charged by an operator in a noncompetitive environment will, ipso facto, be at least sufficient to cover costs and provide a reasonable profit. If a cable company is allowed to automatically increase rates to the benchmark, even where costs do not justify the increase, it is hardly a "good actor"; it is, merely an unjustifiably profitable actor. There is no basis for contorting the policy and the language of the CPCA to guarantee an operator more than a reasonable profit.

4. The Regulatory Methods Proposed By The Industry Are Too Difficult to Administer

a. The Industry Method is Both Complex and Inaccurate

To the extent that the industry comments or corresponding studies actually proposed methods for implementing benchmarks,[59] they present administratively burdensome methods. For instance, to determine appropriate benchmarks for basic service rates, the NCTA proposal sets forth a complicated method that requires the FCC to collect data from regulated and unregulated systems, to determine which factors are likely to effect costs and demand (without actually considering any cost data).[60] The FCC is to then identify the "effects of

[58] This is also inconsistent with the intention that rate regulation formulas establish a maximum price. House Report 82.

[59] TCI and Time Warner, for example, refrain from commenting on appropriate methods for setting benchmarks until the FCC has gathered data. TCI comments at 17; Time Warner comments at 23.

[60] See NCTA study.

competition" and to determine what objective factors explain differences across systems. Those factors are used to form a grid. Each system falls into a section of the grid. The upper end of rates for service in each grid are adjusted downward to reflect the "effects of competition." This sets the benchmark for basic rates. However, adjustments still need to be made for "increased" PEG costs, franchise fees and taxes.[61] Special consideration needs to be made for retiering and rate changes.[62]

Similar data collection and evaluation would have to be done with respect to non-basic services. The FCC would then have to determine which system in each category have the highest "unexplained" average revenues.[63] The highest five percent of rates in each category would be presumed unreasonable. All other rates would be presumed reasonable, and would not be subject to review by the FCC.[64] Thus, the suggested procedures for identifying benchmarks involve at least as much, if not more data collection than cost-based methods proposed by the Coalition and others. Further, the process proposed by the industry for analyzing the collected data is more complex (and more subjective) than the approach proposed by the Coalition for

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[61] NCTA study at 15-16.

[62] Id. at 27-28.

[63] This is based on yet another complicated calculation. Id. at 20.

[64] Id. at 23.

analyzing cost data. Worse, because the data collection will be subject to gaming and ignores costs,[65] in the end it results in imprecise categorizations, and fails to achieve Congress' goal of assuring rates that are reasonable.[66]

Moreover, the method proposed by the NCTA contemplates three stages of setting and reviewing benchmarks.[67] Thus, for every basic and for every non-basic rate, there potentially would be (1) the initial determination of benchmarks, (2) an "intermediate" appeal by an operator, showing that the benchmark was too high in light of individualized circumstances, and (3) a full cost-of-service proceeding. Apparently another double level of appeals could subsequently be held at the FCC. The number of potential proceedings would be multiplied by the number of benchmarks for basic and non-basic tiers (i.e., the number of different sections on the grid). Such multiple layers of reviewing rates would be extremely costly and time-consuming.

In addition, despite its alleged intent to minimize the FCC's burden regarding rate complaints, the NCTA methodology practically guarantees that <u>millions</u> of complaints

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[65] <u>See</u> <u>Efficient Regulation of Basic-Tier Cable Rates</u>, prepared for National Association of Broadcasters by John Haring, Jeffrey H. Rohlfs, Harry M. Shooshen 111, January 26, 1992, 8-10 (hereafter "NAB study").

[66] Further complexities arise with respect to the industry's proposed methods for regulation of equipment, and making periodic adjustments to benchmarks. <u>See, e.g.</u>, Time Warner study at 26 (suggesting that periodic adjustments can be made by using a "cable system costs" index, while recognizing that such index doesn't exist and may be difficult to create).

[67] NCTA study at 6.

warranting FCC attention will come flooding in. If the FCC adopts the NCTA's suggestion that five percent of non-basic rates are presumptively unreasonable, 2.76 million subscribers from 554 systems will be eligible to file complaints.[68] If the FCC further accepts that the top five percent of rates in every category (or grid section) merit review and possible rollbacks, the number of potential complaints will be multiplied by the number of categories. That, of course, would not be the end of the matter. As suggested by the rate adjustment procedures above, the NCTA method is inherently inaccurate. Unless the Commission arbitrarily refused to review even excessive expanded basic rates which were not among the top 2-5% -- an approach that cannot be squared with the statute -- the NCTA approach will create confusion in every community as to what is or is not a reasonable charge and therefore will lead to more, not fewer, requests for relief.

In sum, while industry commenters claim that Congress' "key objective" was to adopt the "least costly" method of regulation,[69] the regulatory methods proposed by the industry do not accomplish this purported objective.[70] Instead, they offer the regulatory equivalent of running in place: a lot of energy is required, but the process does not lead you anywhere.

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[68] NCTA study at 23.

[69] Time Warner study at 9.

[70] The Coalition's regulatory method is comparatively simple to apply.

b. The Industry's Approach cannot be Justified by Criticisms of Traditional Cost-Of-Service Regulation

Comments filed by the cable industry discuss at length the drawbacks of traditional cost-of-service or rate-of-return regulation in an apparent effort to suggest that this approach is the viable alternative.[71] They cite in particular the fact that costs vary widely from company to company, that such regulation is costly and time-consuming for all parties involved, and that it provides disincentives for efficiency. In fact, it is evident that (1) the industry's complaints against cost of service methods are much exaggerated, (2) the industry's proposed solutions present far more significant problems; and (3) most importantly, the cost-based benchmark prepared by the Coalition results in reasonable rates and is not subject to the same criticisms as traditional cost-of-service regulation.

Part II, infra, and Smith & Katz Comment Analysis, explain in some detail why the industry's criticism of traditional cost-of-service regulation are irrelevant to a cost-based benchmark.[72] See also NAB Study at 5, 6. We deal below with the industry's criticism of traditional cost-of-service regulation.

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[71] See Time Warner comments at 20-21; Continental Cablevision comments at 23-25.

[72] Of course, under the industry's proposals costs may be considered in later, supplementing proceedings, but the fact that such proceeding will be required lead to the question: why not use a method that considers costs ab initio?

The claim that costs vary from system to system does not lead to the industry's apparent conclusion that costs should be ignored in setting a benchmark. To the contrary, it suggests that over the long term, rates are best set in a manner that appropriately considers costs. Traditional cost-of-service regulation is certainly able to ensure that rates reflect the costs in any franchise area. The benchmarks proposed by the industry, at least initially, do not make allowances for the alleged varying costs of providing service (other than, arguably, the proposed pass-throughs -- and "double-counting" -- of PEG costs and franchise fees).

The industry also claims that benchmarks provide appropriate incentives, and that traditional cost-of-service regulation does not. For example, benchmarks allegedly provide incentives to reduce costs and create new services that subscribers desire.[73] Benchmarks may well provide companies some incentive to cut costs, but it is not clear why the FCC should assume costs will be reduced in a way that benefits subscribers, particularly if benchmarks are not cost-based, and thus are not reduced in light of reduced costs. Nor is it clear that the incentives provided by traditional cost-of-service regulation are inappropriate for the industry. In fact, a study prepared for and submitted in conjunction with comments filed by Time Warner states that cost-based regulation, "reward[s] capital

[73] TCI comments at 16-17.

investment."[74] That same study asserts that, "The progress of the cable industry has been fueled in large part by large investments in infrastructure."[75] Thus, according to Time Warner, incentives to invest capital are important to developing and improving cable service, and can be provided for through cost-of-service regulation.

Another argument posed by the industry in opposition to traditional cost-of-service regulation is that it will not provide an effective restraint on rates, because operators will circumvent it by (1) moving channels off of tiers and offer them instead on a premium basis, (2) eliminating expensive programming, and (3) adding inexpensive programming.[76] In fact, however, this is a greater risk if the price based benchmarks proposed by the industry are used, because price-based benchmarks are by nature insensitive to cost changes.[77] Where traditional cost-of-service regulation is applied, the regulator can provide some check against such retiering, reducing rates to effect reductions in costs. Similarly, greater protection against deterioration of quality of service is accorded where a

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[74] Time Warner study at 17.

[75] Id. at 4.

[76] Time Warner study at 37. The practices described are examples of evasive retiering Congress ordered the FCC to prevent, through appropriate regulations. § 623(h), 106 Stat. at 1470.

[77] While there are ways to address these problems, they all involve consideration of costs, and are not proposed by the industry.

cost-based, rather than a price-based, method of regulating is used.

Finally, the industry protests against traditional cost-of-service regulation on the grounds that it is unduly burdensome.[78] While the Coalition does not disagree that the demands of cost-of-service regulation may pose a problem in some communities, it believes that the difficulties as presented by the industry are somewhat exaggerated. As evidence, the Coalition has pointed out that many communities, both large and small, already subject utilities and even cable companies to cost-of-service regulation. The Attorney General for the State of Connecticut points out, "By the time cable operators, this Commission and franchising authorities work out all the intricacies of the 'benchmarks' and other components, even the most detailed cost-of-service rate proceeding could have been long completed."[79]

5. The Approach Suggested By the Industry Does Not Provide Timely Relief

As noted, many cable companies have reserved commenting on what is the appropriate benchmark until after the FCC collects data, and proposes how the data might be used.[80] While the industry generally supports the notion of an interim regulatory

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[78] <u>See, e.g.</u>, TCI comments at 22.

[79] Comments of the Attorney General, State of Connecticut at 6.

[80] Time Warner comments at 23; TCI comments at 17.

approach, and assures the Commission that it need not have final regulations in place by April 3, it gives little guidance on what immediate action the FCC should take. Apparently, the industry is happy to perpetuate the status quo, and urges the FCC to take its time coming up with final rate regulations. It is not surprising that cable operators are content to stave off regulation and continue to collect monopoly profits for as long as possible. However, that is not what Congress intended. § 623(b), 106 Stat. at 1471. See also § 623(b)(2), (c)(1), 106 Stat. at 1465-66, 1468.

Congress wanted to give subscribers relief from monopoly cable rates as soon as possible. While the regulatory method adopted by the Commission can be adjusted over time, there is no ground for taking action on April 3 that defers regulation altogether. As of April 3, the Commission must have regulation in place which assure that rates for basic service are reasonable, that rates for the basic service tier do not exceed rates that would be changed if the system were subject to effective competition, and that unreasonable expanded basic rates can be identified and reduced. § 623(b), 106 Stat. at 1465, 1468. In short, consumers are entitled to immediate relief. Moreover, Section 623(c)(3) states that, after 180 days following the effective date of the FCC's regulations, complaints regarding non-basic rates may only be filed "within a reasonable period" following a rate change. Thus, complaints about existing expanded basic rates may have to be filed by October, 1993. In order to ensure subscribers and franchising authorities may challenge existing rates, the Commission's regulations, as initially adopted, must provide guidelines for identifying unreasonable non-basic rates. Under the proposal of the industry this could not be done. The proposal set forth by the Coalition, by contrast, provides significant relief from monopoly rates immediately by establishing an interim benchmark that can be adopted by the FCC immediately, while the FCC proceeds to adopt further regulations that will ensure rates are reasonable over the long term.

6. The Procedures Proposed by the Industry For Regulating Rates Ignore Practical Realities and Due Process Concerns

Comments filed by the cable industry set forth various proposals for what procedures should govern basic and non-basic rate regulation. In general, the procedures advocated by the industry would require a regulator to act within 30 or 60 days of a proposed basic rate increase. (or initial regulation following certification).[81] The comments also assert that complaints regarding non-basic rates must be filed within 30 days of the rate change.[82] The industry professes concern that longer review periods or extensive hearings prior to implementation will unfairly harm operators.

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[81] See, e.g., comments of NCTA at 73; comments of Time Warner at 32-33.

[82] See, e.g., comments of NCTA at 74-75; comments of TCI at 59.

The Act on its face requires an operator to give 30 days notice prior to any basic rate increase. § 623(b)(6), 106 Stat. at 1467. The Act further requires franchise authorities that regulate rates to provide "a reasonable opportunity for consideration of the views of interested parties." § 623(a)(3)(C), 106 Stat. at 1464. In addition, laws in many states or communities require rate decisions to be passed by resolution or ordinance, or impose other procedural requirements that require more than 30 or 60 days to complete. A 30 to 60 day period is not adequate time to collect information, consider views of interested parties, satisfy any procedural requirements, and issue a decision.[83]

Some commenters suggest that, in any event, the rate should be allowed to go forward after 30 days, subject to rollback. One operator suggests that "operators have no incentive to price unreasonably once 'reasonable' rates have been determined."[84] Franchising authorities (it is argued) always have incentives to deny rate increases because they are immune from damages.[85] These suggestions are without merit. In Gillette, Wyoming, TCI ignored valid local decisions regarding risks and implemented a rate almost $7.00 above the reasonable rate level established by the City. More generally, and as the

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83 The coalition believes that 150 days, including the notice period, is an adequate and appropriate amount of time within which a decision must be reached. See Comments of Coalition at 61.

84 TCI comments at 52-53.

85 Id.

Commission is well aware, regulated companies often file implement rates that are later determined to be excessive. Particularly given the NCTA's not-so-subtle suggestion that the industry will try, heart and soul, to evade regulation, it becomes critical to long-term rate stability to discourage filing for excessive rate increases. This can best be accomplished by allowing franchising authorities to suspend implementation of rate increases pending review.

The fact that franchising authorities are immune from damage liability is hardly justification for allowing new rates to be implemented prior to review. Franchising authorities have no reason to deny (and every reason to allow) a rate increase that truly is reasonable. Local governments are well aware of the importance of cable service to customers, and particularly where rate increases are coupled with improvement in service, would have no incentive to discourage a cable operator from providing good service at a reasonable rate.

The industry's proposed procedures to challenge non-basic rates are equally flawed. Allowing 30 days to file a complaint regarding non-basic service rates, as the industry urges, is not an adequate period of time.[86] Subscribers need time to recognize that a rate increase has occurred (not always an easy task), explore their rights and obligations under FCC

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[86] One operator even suggests that a complainant must notify the operator at least 15 days before it files a complaint, effectively giving a complainant only 15 days to decide to take action. Comments of Continental Cablevision at 55-56.

regulations to file complaints, and file a complaint setting forth the necessary minimum showing.[87] While the Act does not specify what constitutes a "reasonable period" for purposes of filing complaints, the fact that it allows a subscriber 180 days to complain about existing rates is an indication that 180 days is a minimally reasonable period within which to require action. § 623(c)(3), 106 Stat. at 1469.[88]

Further, despite claims to the contrary,[89] operators are not harmed by allowing a longer filing period. The operator will be able to charge the new rate until it is determined to be unreasonable. § 623(c)(1)(C), 106 Stat. at 1468. Certainly, the risk of harm to the operator, if any, is outweighed by the need for a longer filing period in order to achieve the purposes of the Act's non-basic rate regulation provisions.

D. The Act Does Not Permit Ineffective Regulation To Avoid or Reduce Administrative Costs

The industry makes much of the fact that the CPCA advises the Commission that, in prescribing basic service rate regulations, it should seek to reduce the administrative burdens of all parties involved. § 623(b)(2)(A), 106 Stat. at 1466.[90]

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[87] See Coalition's initial comments at 66-68.

[88] The shorter the time frame, of course, the less time the operator and potential complainants will have to attempt to resolve rate disputes informally, before filing at the FCC.

[89] NCTA comments at 74-75.

[90] The Commission is not directed to devise its regulations for expanded basic to ease administrative burdens on behalf of the operator.

While administrative ease certainly should be considered in evaluating possible regulatory approaches, the Commission is not authorized to use "administrative feasibility" as an excuse to establish an ineffective regulatory regime. While the statute states the Commission "shall seek" to reduce the administrative burden on all, its regulations must nonetheless "carry out its obligations" to "ensure that the rates for the basic service tier are reasonable". § 623(b)(1)-(2), 106 Stat. at 1465-66. The FCC must determine the best rules for rate regulation, in light of practical considerations.

Thus, the FCC should be attempting to discover how it can satisfy the CPCA's directive to ensure that rates are set at reasonable and competitive levels. Only after it has determined the most effective approach should the Commission consider whether that approach is practicable, and if not, how it can be revised to make implementation practicable. The cable industry, however, reverses this order. It first determines what will be the easiest method to apply (at least for cable operators), and then attempts to justify the method with a few feeble claims that this approach will benefit subscribers and is consistent with congressional intent. Primarily, the industry attempts to buttress this argument with claims that Congress' "key objective" was that the FCC adopt the "least costly" method of regulation,[91] or that overregulation will limit technological

[91] Time Warner study at 9.

advances and thus ultimately hurt subscribers.[92] Ultimately, however, the industry does not even attempt to argue that its suggestions for regulatory methods will ensure that rates are set at reasonable or competitive levels, as the Act requires.

The Coalition recognizes that the Act imposes administrative burdens on the FCC. In addition to establishing a remarkable number of regulations on a wide variety of issues (in addition to rate regulation), and periodically revising or updating those regulations, the FCC will have to regulate both basic and non-basic rates in certain instances. The solution cannot be, however, to ignore Congress' orders and allow monopolistic cable operators to continue to take advantage of subscribers. While the FCC can establish regulations that require cable operators, franchising authorities and even subscribers to take certain preliminary steps to ease the FCC's burdens, the FCC cannot drop the ball where Congress has ordered the FCC to carry it.[93]

II. THE APPROACH ADVOCATED BY THE COALITION IS BOTH EFFECTIVE AND EASY TO APPLY

As explained in detail in its Initial Comments, the Coalition proposes that the Commission adopt rate regulations containing three main elements:

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[92] NCTA comments at 1; TCI comments at iv; Time Warner comments at 2.

[93] Ultimately, effective rate regulation will reduce administrative burdens far more than ineffective regulation. See Part II, *infra*.